

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

05/15/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000424

FILED: \_\_\_\_\_

STATE OF ARIZONA

WADE J SKALSKY

v.

CHARLES HENRY RUSSELL

CRAIG W PENROD

FINANCIAL SERVICES-CCC  
PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. 5850291

Charge: 1. DUI OR APC  
2. DUI W/A.C. .10 OR HIGHER

DOB: 12/30/69

DOC: 03/31/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the date of oral argument on April 15, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, the exhibits made of record and the Memoranda and oral argument submitted by counsel.

The only issue raised by the Appellant concerns the trial judge's denial of Appellant's Motion to Suppress. At the conclusion of an evidentiary hearing on June 19, 2001, the trial judge made a finding that the State would be unable to introduce the results of the breath test conducted by the police upon Appellant using the "statutory method" found in A.R.S. Section 28-1323(A)(1-5). The trial judge ordered that the State would not be permitted to "introduce the breath test results obtained from Mr. Russell via the so called 'statutory method'".<sup>1</sup> The trial judge further denied Appellant's Motion to Suppress finding that replicate testing was not a requirement in this case and that at trial the State would not be precluded from attempting to admit the breath test results pursuant to the Deason<sup>2</sup> "second method".<sup>3</sup> As Appellee points out, Appellant has failed to order a record of the trial which would reflect whether the State properly satisfied the foundational requirements for the admission of the breath test results under the Deason method.<sup>4</sup>

Appellant specifically argues that a second sample of his breath should have been preserved by the police. However, this Court rejects that contention for the reason that Moss v. Superior Court<sup>5</sup> holds that second samples need not be preserved for a Defendant's use when replicate tests are performed using

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<sup>1</sup> Cassette tape recording of proceedings of June 19, 2001.

<sup>2</sup> State ex rel. Collins v. Seidel (Deason, Real Party in Interest), 142 Ariz. 587, 691 P.2d 678 (1984).

<sup>3</sup> Id.; Deason recognized that breath test results could be introduced pursuant to Rule 702, Ariz. Rules of Evidence.

<sup>4</sup> Appellee's memo at pages 4-5.

<sup>5</sup> 175 Ariz. 348, 857 P.2d 400 (App. 1993).

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the Intoxilyzer 5000. Therefore, the trial judge did not error in denying Appellant's Motion to Suppress.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all further and future proceedings in this case.